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No.

In the Supreme Court of the United States

MAY TERM, 1983

ANTHONY ZIRPOLO,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether the Trial Court erred in ruling that a witness, Edward Dalton, could invoke his Fifth Amendment right not to testify, thereby excluding exculpatory testimony.

2. Whether the Trial Court erred in ruling that the statement of the witness Edward Dalton was inadmissible.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Anthony Zirpolo, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of The United States Court of Appeals for the First Circuit on

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit unreported at this time and is printed in Appendix A *infra* at A1-A8.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

21 U.S.C. § 841(a)(1)
18 U.S.C. § 2
Fed. R. Evid. 804(b)(3)
Fed. R. Evid. 804(a)(1)
Fed. R. Evid. 804(b)(5)

Statement of the Case

Defendant/appellant Anthony Zirpolo, Joseph Vecchio and Edward Dalton were charged in a five-count indictment (#81-217-G).

Count One charged the defendants with conspiracy (21 U.S.C. § 846) to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Prior to trial the defendant Edward Dalton pleaded guilty to Counts 1, 2 and 3 and pursuant to a plea bargain Counts 4 and 5 were dismissed at the time of sentencing.

The remaining defendants (appellant Anthony Zirpolo and Joseph Vecchio) were tried by a jury and on September 24, 1981, the defendant Joseph Vecchio was found not guilty on all counts. The defendant/appellant Zirpolo was found guilty of Counts 1, 3, 4 & 5 and not guilty on Count Two.

On October 15, 1981, the defendant/appellant was sentenced to five (5) years to be served on each of Counts 1, 3, 4 & 5, said sentence by the courts to run concurrently with each other. Further the court imposed a four (4) year special parole term on counts three, four and five.

The Evidence

During the course of the trial, Agent Keefe testified as follows:

On or about May 20, 1980, Agent Joseph Keefe, in an undercover capacity, of the Drug Enforcement Administration

met with Edward Dalton at the Airport Hilton Hotel parking lot, East Boston.

On this date Agent Keefe represented to Dalton that he was in the business of buying and selling cocaine. On this date Agent Keefe purchased from Dalton an ounce of cocaine and paid him $2,200.00.

Beginning on June 4, 1980, Agent Keefe made arrangements to make further purchases of cocaine from Dalton and arranged to meet him at the parking lot of the RAMADA INN, Route 1, East Boston.

On June 4, 1980, Keefe met Dalton as prearranged, in Keefe's vehicle. Dalton had a metal container with a sample of cocaine for Keefe to sample. Keefe declined and indicated that he was only interested in "sampling packages" that he purchased.

Keefe and Dalton engaged in a conversation as to the quality of cocaine. Dalton indicated that he and his partner "Zip" had a new partner and the quality of cocaine would be "50 to 60 percent coke". The meeting terminated with Keefe agreeing to contact Dalton that evening or the next day if he was interested in purchasing any cocaine.

On or about June 16, 1980, the next meeting was arranged by a third party with Dalton.

Dalton and Keefe met at the Ramada Inn and Dalton introduced Keefe to "Joe"[1] who he indicated was the "man" he should talk to about the "product". Keefe and "Joe" discussed cocaine and the poor quality of Keefe's prior purchase. Keefe, Dalton and Joe then discussed the better quality of "Joe's product" and the prices per ounce. Keefe, then arranged to purchase two ounces of cocaine on the following day.

On the next day, (June 17, 1980) Keefe was informed by Dalton that there would be a delay until at least June 18, 1980

[1] "Joe" was later identified as the defendant Joseph Vecchio by Agent Keefe.

for the transaction. Keefe and Dalton agreed to meet on the Nineteenth of June.

At about 3:00 p.m., on the 19th of June, Keefe contacted Dalton, by telephone. They had a conversation in which Dalton indicated that he had met with Vecchio and "Junior"; that they were running late and agreed to meet in one hour at the airport Hilton. As pre-arranged Keefe met with Dalton, who was alone, and in Keefe's vehicle he purchased two ounces of cocaine and paid Dalton $3,800.00.

Later in the evening of the same day Keefe again met with Dalton, at which time Keefe indicated that his purchase was "five grams" short. It was then agreed that Dalton would contact him the following morning to deliver the "five grams". As agreed the following morning (June 20th) Dalton and Keefe communicated by telephone and a meeting was set; they met at the airport Hilton and Dalton delivered the five grams.

During this meeting Dalton indicated that Vecchio was "their chemist" and Zip or Junior ran "the business". He indicated they were in the process of expanding their business by securing a larger quantity of cocaine from Florida and increasing their distribution. Dalton also indicated that "Zip" wanted to meet with Keefe personally to "straighten things out and talk about business".

Soon thereafter, as a result of a telephonic communication with Dalton, a meeting was set for June 25, 1980 at the airport Hilton. Dalton advised Keefe that "Zip" would be at this meeting. Keefe proceeded to the parking lot and as he arrived observed Dalton and another male in a vehicle. The passenger got out of the Dalton vehicle walked toward Keefe and introduced himself as "Tony". A conversation ensued concerning cocaine, and they were then joined by Dalton and a young child. They all returned to Dalton's vehicle and drove around the airport freight area, discussing the prior cocaine purchases and future business.

On September 4, 1980, Keefe talked to "Zip" and arranged to meet with him on September 9, 1980. Keefe on September 9, 1980, arrived at the Impact Chemical Company, Sumner St., East Boston, walked to the front door and was met by Zirpolo at which time they engaged in a conversation concerning cocaine. It was agreed that Keefe would purchase two ounces later that day for $1,800.00 an ounce. The meeting concluded, Keefe left and as prearranged called Zirpolo at about 1:50 p.m., that afternoon. It was arranged that Keefe would call the next day (September 10, 1980) which he did. It was then agreed that Keefe would meet with Zirpolo at 9:30 a.m., the following day to pick up "the stuff".

On September 11, 1980, Keefe arrived at the Impact Chemical Company, met Zirpolo at the corner of Sumner and Orleans Street. Keefe was told to return at about 11:10 a.m.

Keefe returned at 11:15 a.m., was directed by Zirpolo to enter the building. As he entered the building, Zirpolo said "it's over there" and pointed to a box which was a model kit box with *USS NIMITZ* printed on it. Keefe paid $3,600.00 to Zirpolo, took the box from the couch where it had been placed and exited the building.

Subsequently Keefe observed in the box, with the unassembled model, plastic bags containing "white powder".

On cross-examination Agent Keefe testified:

During all of his conversation with Dalton, Dalton never said that he obtained cocaine from Zirpolo.

That Dalton was under surveillance by other Agents on May 20, June 4, June 16, June 19 and June 20 and that after he left Keefe, he never went to see Zirpolo.

Keefe knew that during this period of time Zirpolo was working at Avis Rental across from the airport Hilton.

Prior to trial Edward Dalton entered pleas of guilty to Counts 1, 2 & 3 of the indictment. As part of the plea agreement with Dalton, the government agreed to dismiss Counts 4 and 5 at the time of sentencing.

A consolidated trial of the remaining defendants (Vecchio and the appellant) was conducted before Hon. W. Arthur Garrity, Jr., District Judge and a jury.

Reasons for Granting Writ

Prior to trial appellant Zirpolo issued a subpoena to compell Edward Dalton to appear as a defense witness. At or about the same time, Dalton executed a statement under the penalty of perjury exculpating the appellant, Zirpolo.

Prior to the commencement of the third day of trial, Dalton was present in the courtroom represented by counsel. At that time, Dalton's counsel represented to the Court that Dalton intended to invoke his "rights under the Fifth Amendment." It was specifically agreed and ruled upon by the court that representation by counsel that Dalton would invoke his privilege, was sufficient and he would not have to take the witness stand.

Subsequent to Dalton's counsel invoking the privilege on behalf of Dalton, the court inquired of the government as to Dalton's status at which time it was indicated that the remaining counts of the indictment pending against Dalton would be dismissed on the "seventh of October" at the time of sentencing.

It was then indicated to the court by Dalton's counsel that part of the plea agreement was that Dalton would not testify "for or against the government." However, the government, indicated clearly, that it was the government's position that there was no restriction of Dalton being a witness for the defendant in the "plea Bargain". In fact the government's

position was that such a promise would be "improper".

The Government and counsel for Dalton argued that Dalton could invoke his privilege because (a) there were counts that had not been *dismissed*, even though they would be (b) that Dalton could, possibly, expose himself to state charges and (c) that Dalton had discussed "other drugs" with the undercover agent.

It should be noted that the government and defense counsel had already agreed to limit examination of witnesses to *exclude* any testimony of conversations concerning other drugs.

By way of an offer of proof as to the expected testimony of Dalton, appellant had marked for identification (Ex. B-2) an "affidavit" of Dalton which contained substantially the expected testimony of Dalton.

The trial court ruled that Dalton could invoke the Fifth Amendment. Appellant objected thereto.

In *United States v. Pardo*, 636 F.2d 535 (D.C.A. 1980) the court of appeals was confronted with this very same issue. The similarity of facts in the *Pardo* case are such that appellant would submit that except for the names of the parties and the dates. They are *identical*. Therefore, appellant will quote from length the courts decision in *Pardo*:

> Appellants first claim that the trial judge committed reversible error in upholding Clifford Corbett's invocation of the Fifth Amendment privilege against self-incrimination and corresponding refusal to testify at the trial of his former co-defendants. All four appellants here contend that Corbett did not have a Fifth Amendment right to refuse to testify ....
>
> It is critical at the outset to review the circumstances of Corbett's dismissal from this action. In addition to the two count indictment in the present case, Crim. No. 79-73, Corbett was named in a four count indictment in Crim. No. 79-72, and a one count indictment in Crim. No. 79-74. All charges against Corbett involved narcotics. On

March 20, 1979, Corbett pled guilty to one count in 79-72 and to the sole count in 79-74. As a part of the plea arrangement with the Government, the three remaining counts of 79-72 and the two counts in the present case 79-73 were dismissed at the time of sentencing.

Prior to trial, appellant Goodwin submitted a "Motion For Compulsory Process and Testimony" (R.24). . . .

Appellant Tate also made a pre-trial motion to secure the testimony of Corbett (R.27). In support of the motion, Tate submitted an affidavit which declared that Corbett had told Tate, in the presence of Tate's counsel, that Agent Lee was lying in stating that Tate had made certain incriminating statements in the warehouse . . .

Appellants Mendoza and Pardo did not file or join in similar motions or proffers of anticipated testimony before trial.

Judge Robinson ruled on these motions immediately prior to the commencement of the trial (Tr. 17-29). The trial judge first stated: "What is the proffer that is expected out of his [Corbett's] testimony? Who was going to call him as a witness? (Tr. 17, emphasis supplied). Counsel for appellant Tate responded "I intend to;" counsel for appellant Goodwin responded "I would call him as well, your Honor" (Tr. 17) . . . Counsel for Tate offered that Corbett would testify that Tate said nothing inside the warehouse and that Tate did not do anything else incriminating (Tr. 18). Counsel for Goodwin offered that Corbett would testify that Goodwin's involvement in the transaction was purely accidental, that Corbett had first met Goodwin that day (Tr. 18). Counsel for both Tate and Goodwin promised to limit examination to the events occurring at the warehouse; no background or unrelated testimony would be sought . . .

Counsel for Corbett responded that Corbett would invoke the Fifth Amendment if called to the stand. Counsel expressed a fear that cross-examination of Corbett might touch upon matters which would provide "a link or clue that might well enable the prosecution to charge him with conspiracy in some cases where he had a very small part but, nevertheless, would expose him to a possible prosecution" (Tr. 20). The Government fully supported this position (Tr. 21).

> The trial court upheld Corbett's invocation of the Fifth Amendment. District Judge Robinson denied the motions of defendants Tate and Goodwin to compel testimony, stating (Tr. 29):
>
> The privilege has been asserted. The cases are clear that if there is a reasonable prospect that he at any level - the Fifth Amendment privilege covers not only prospective federal prosecutions but prospective state prosecutions - at any level if there is a reasonable prospect that prosecution could occur and not just with respect to matters that grew out of the transaction on December 29th, but any transaction, then Mr. Corbett has a Fifth Amendment privilege that can be asserted. He has asserted it and therefore I will not compel his testimony.

636 F.2d at 539-541.

Appellants Goodwin and Tate properly raise the difficult question of whether the trial court erred in upholding Clifford Corbett's claim of privilege. Situations such as the present case typically raise a painful choice between a defendant's Sixth Amendment right to procure testimony in his favor and a witness' Fifth Amendment right not to incriminate himself. On careful examination, however, we conclude that the present case presents the less painful conflict between the defendant's Sixth Amendment right to procure testimony and the Government's right to cross-examine the witness offering that testimony ....

The Fifth Amendment privilege against self-incrimination is one of the cornerstones of the American constitutional system of criminal procedure and must be liberally construed to achieve its protective purpose. *Maness v. Meyers*, 419 U.S. 449, 461, 95 S.Ct. 584, 592, 42 L.Ed2d 574 (1975). At the same time, however, the privilege has no application beyond that "protective purpose." As stated by the Supreme Court in *Ullmann v. United States*, 350 U.S. 422, 431, 76 S.Ct. 497, 502, 100 L.Ed. 511 (1956), *quoting Hale v. Henkel*, 201 U.S. 43, 67, 26 S.Ct. 370, 376, 50 L.Ed. 652 (1906):

> The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself - in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.

In short, the existence of the privilege is not automatic.

It is clear that the privilege against self-incrimination ceases to apply once a witness has been convicted of the offense with respect to which he fears incrimination. As stated in *United States v. Romero*, 249 F.2d 371, 375 (2d Cir. 1957):

> It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify.

See also In re Liddy, 506 F.2d 1293, 1299-1300 (D.C. Cir. 1974). The same result of course attaches if the witness pled guilty to the offense in question, rather than being convicted following trial. As recognized by the Supreme Court, a "defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 22 L.Ed.2d 418 (1969).

Similarly, the privilege is also lost with respect to charges or counts of an indictment which are dismissed as part of a plea agreement. This conclusion necessarily follows from the holding of the Supreme Court in *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971), that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be fulfilled*" (emphasis supplied). Since promises to dismiss charges as part of a plea agreement are binding on the Government, a witness may not be exposed to prosecution on those charges, and the need for the privilege is lost.

As a consequence of these principles, it is clear that Corbett faced no futher threat of incrimination concerning the events surrounding the sale of cocaine in the warehouse on December 29, 1978. In return for his tendered guilty pleas for sales occurring on November 21, 1978 (Crim. No. 79-74) and November 27, 1978 (Crim. No. 79-72), all charges concerning the events on December 29, 1978 against Corbett were dropped. Corbett could testify concerning the transaction occurring on that date and involving the defendants in this case with

> absolutely no fear of subjecting himself to further prosecution. As to those events, therefore, Corbett could be compelled to testify.

636 F.2d 542-544. (Footnotes omitted).

In the instant case Dalton's "plea bargain" was identical to that in *Pardo* and therefore even though the remaining counts had not actually been dismissed, "such promises to dismiss" were binding on the government.

As to the government's argument that "Dalton" had "discussed" other drugs with the undercover agent, it must be kept in mind that when Agent Keefe testified it was agreed and stipulated by counsel that there would be no examination into these conversations. In fact Agent Keefe was so instructed by the Government.

Also, it is clear that any conversations Dalton had with Agent Keefe, would not have been relevant to the present case and the Government could not have inquired in cross-examination into these matters. This is so especially in light of a specific ruling by the trial judge during Keefe's testimony as follows:

> The Court: Oh, I am going to tell Mr. Boudreau to talk to that man, and the other man as well, *so you can confine the evidence to the case that we are trying*. (emp. supp.)

Confronted with this very same issue, the court in *Pardo*, 636 F.2d at 544 held:

> At the same time, however, it is equally true that a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea arrangement. As stated in *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973):
>
> > But the waiver of privilege to be inferred from the guilty plea is only for purposes related to a determination of guilt or innocence of the crime admitted.

> Pleading guilty to a crime does not waive the privilege not to incriminate oneself at other times in other crimes, any more than conviction of one crime erases the privilege as it relates to others (citations omitted).

Thus, Clifford Corbett could not be compelled to testify concerning any matters which would in fact tend to incriminate him and which were outside the scope of the charges to which he had pled guilty or which had been dismissed as part of the plea arrangement. As to such matters, the privilege would remain.

Government insisted, however, that if Corbett took the stand, it would have the right to cross-examine Corbett as to matters outside the scope of the charges in the plea arrangement in order to impeach effectively his testimony. It is clear, therefore, that this case does not involve a conflict between Corbett's Fifth Amendment right and the defendants' Sixth Amendment right to procure testimony in their favor. Rather, this case involves a direct conflict between a defendant's Sixth Amendment right to procure testimony and the Government's right to cross-examine the witness offering that testimony.

> We believe that when a conflict exists between the defendant's Sixth Amendment right to procure testimony in his favor and the Government's right to cross-examine, it is necessary to balance the defendant's need to present the evidence against the Government's ability to cross-examine the witness effectively to guarantee truthfulness and accuracy. Certainly the defendant does not have a blanket right to produce testimony that the Government is completely foreclosed from challenging on cross-examination. But where the rights of the defendant and the Government can be reconciled, the defendant's constitutional right to procure testimony in his favor must prevail.

In footnote 29, at pg. 545 of the *Pardo* decision, the appeals court stated further:

> The Supreme Court has recognized the fundamental importance of the Sixth Amendment right of the defendant to procure testimony in his behalf. As stated in *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920,

1923, 18 L.Ed. 2d 1019 (1967): "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." As later added by the Court in *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed 2d 297 (1973), "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."

The Court in *Pardo*, went on to state:

First, and most importantly, we note that the Government will have an unlimited opportunity to cross-examine Corbett as to whatever he may testify concerning the events at the warehouse on December 29. This is not a case in which the witness is attempting to testify "selectively," i.e. to testify concerning certain events on direct examination, but refuse to testify as to those same events on cross-examination on the grounds of the Fifth Amendment. As demonstrated above, Clifford Corbett has absolutely no Fifth Amendment right to refuse to testify concerning the events that transpired on December 29. Just as the defendants will have a full right to explore his testimony on that subject on direct examination, so too will the Government be able to subject that testimony to unlimited cross-examination. There may be no guarantee that such cross-examination will uncover every possible falsification in the witness' testimony. If that were the test, however, the defendants' Sixth Amendment right to put on a defense would be meaningless.

Second, it is clear that in this case the Government will have ample opportunity to impeach Corbett collaterally as well. Perhaps most critically, the prosecution will be able in its questioning of Corbett and argument to the jury to suggest any tendency that Corbett may have to testify falsely to exonerate his co-defendants or to pro-

> tect himself from reprisal, especially in light of the fact that Corbett may not be prosecuted for the events in question. In addition, the Government can attempt to impeach Corbett through his guilty pleas to two other offenses. The Government can question Corbett concerning other matters included in the additional charges that were dropped. All this may be done with no threat of incrimination of Corbett. In short, the prosecution will have ample opportunity to attack Corbett's credibility
>
> . . . .
>
> For these reasons, we hold that the trial court committed reversible error in refusing to compel the testimony . . . Corbett has no Fifth Amendment right with respect to those events.

636 F.2d at 545-546.

Certainly, as in *Pardo*, the government in this case would have more than an adequate opportunity to cross-examine Dalton, and attempt to impeach him. But, the jury would be and should be entitled to determine the guilt or innocence of the appellant with *all* the evidence before it.

Assuming arguendo that the witness Edward Dalton had validly invoked his privilege against self-incrimination[2] the Court erred in sustaining the government's objection to the offer of Exhibits "B-1 and B-2" (Dalton's statement - *see* A. 5-6) and thereby precluding the use of the statements in evidence before the jury.

The trial court held that said statement was not admissible on these grounds:

1.) It was not a statement against interest within the meaning of 804(b)(3),
2.) That the corroborating circumstances did not "clearly" indicate the trustworthiness of the statement and,
3.) The statement was ambiguous.

However, notwithstanding this ruling the court found as a fact that the witness Dalton had signed the statement and that it was signed in the presence of a Constable Fixman.

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[2] The defendant/appellant does not concede that the court was correct in allowing Dalton to invoke his Fifth Amendment privilege (*see* Argument I) but argues herein in the alternative.

Federal Rules of Evidence, Rule 804(b)(3) provides:

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Therefore, to be admissible under 804(b)(3), a statement must meet three tests: the declarant's testimony must be unavailable; the statement must so far tend to subject the declarant to criminal liability "that a reasonable man in his position would not have made the statement unless he believed it to be true"; and the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness.

Dalton's testimony was clearly unavailable under Rule 804(a)(1), which defines unavailability to include declarants not testifying because of privilege. Dalton did not take the stand, relying on the privilege against self-incrimination. His unavailability based on the Fifth Amendment privilege satisfied 804(a)(1). *See United States v. Mackin*, 561 F.2d 958 2nd Cir. *cert. denied*, ____ U.S. ____, 98 S.Ct. 490, 54 L.Ed.2d 319 (1977). Rule 804(a)(1) requires an express assertion of the privilege and a ruling by the court that the privilege constitutes unavailability, *see* 4 Weinstein's Evidence 804(a)[01](1976).

In the instant case the trial court and defense counsel accepted the assertion of Dalton's counsel that he would assert the privilege. The trial court then ruled, over objection that

Dalton could so invoke said privilege. Here, Dalton's unavailability as a witness is patent. The trial court in declaring the evidence inadmissible assumed that Dalton was unavailable and ruled that the "other" criteria of 804(b)(3) had not been met.

The statement offered by the defendant/appellant satisfies the requirement that it be against Dalton's penal interest. The court, it would appear, in ruling that the statement was not against his penal interest ruled so because he did not expressly confess to the crime involved.

However Rule 804(b)(3) is not to be read as to be limited to direct confessions of guilt. Rather, by referring to statements that "tend" to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant. Thus, in *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976), the Fifth Circuit held to be against penal interest a statement that the declarant had given the accused a package of heroin instead of a package of valium. Although the statement did not confess to the crime charged against the accused, the statement implied the declarant's guilt of a felony, knowing possession of heroin.

In the instant case the statement of Dalton, clearly a statement against penal interest in pertinent part contains the following statements:

> John O'Master .... introduced me to agent Joseph Keefe who I later sold cocaine to.
>
> * * *
>
> Mr. Zirpolo had nothing to do with the cocaine sales to Keefe of May 20, 1980, June 19, 1980, and June 20, 1980.
>
> * * *
>
> During the discussions [on June 25, 1980 at Airport Hilton] we had, we did not talk about drugs ...
>
> * * *

> On September 11, 1980 or maybe the day before, I delivered a package to Mr. Zirpolo's place of business to be picked up by Mr. Keefe. As far as I know, Mr. Zirpolo did not know what was in the package.

In circumstances even more analogous to the present case, this Circuit in reversing a conviction held a statement to be against penal interest. In *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976), the deceased declarant Tilley had discussed the crime being tried. The accused presented a witness to testify that Tilley had stated during this conversation "Bucky [the accused] wasn't involved. It was Buzzy." The court held the statement admissible under 804(b)(3) because:

> [W]e think that Tilley's [the declarant's] alleged remarks sufficiently tended to subject him to criminal liability "that a reasonable man in his position would not have made the statement unless he believed it to be true." Although the remarks did not amount to a clear confession to a crime . . . we do not understand the hearsay exception to be limited to direct confessions. See Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 57 Bost. U.L. Rev. 148, 158 (1976). A reasonable person would have realized that remarks of the sort attributed to Tilley strongly implied his personal participation in the . . . crimes and hence would tend to subject him to criminal liability. Though by no means conclusive, the statement would be important evidence against Tilley were he himself on trial for the . . . crimes. We cannot say, therefore, that it did not pose the sort of threat to Tilley's interest that the hearsay exception contemplates.

539 F.2d at 251.

In Barrett's trial, the relevance of Tilley's participation is limited to the credence it gives to his views on who else took part. The district court seemed to suggest that in order for exculpatory remarks such as Tilley's to be admissible as against interest, the innocence of the accused must itself be

prejudicial to the declarant. On the facts in the instant case, however, the first part of 804(b)(3) must be read more broadly so that so much of Dalton's statement that exculpated the defendant/appellant and inculpated himself should be considered as part of the statement against Dalton's interest.

It is clear that Dalton's statement would not have been made by "a reasonable man in his position .... unless he believed it to be true." Dalton executed the statement exculpating the defendant/appellant before he was to be sentenced, upon his plea of guilty. The statement was in writing, read by Dalton, signed by Dalton and signed in the presence of a Massachusetts Constable. Such a statement falls within the letter and rationale of the exception provided in Rule 804(b)(3).

The statement was thus admissible under Rule 804(b)(3) if "corroborating circumstances clearly indicate the trustworthiness of the statement." The trial court seemed to indicate that while there were corroborating circumstances, they did not "clearly" indicate the trustworthiness of the statement. Counsel is at a loss to interpret this ruling but would venture the opinion that because the declarant was a co-defendant and it was being offered by the defendant/appellant the circumstance of corroboration were not clear. Such a ruling has not basis in the rationale of 804(b)(3).

A statement exculpating the accused and admissible under Rule 804(b)(3) does not become inadmissible merely because it tends to inculpate the co-defendant declarant. The statement may be offered by the government to inculpate the declarant or by the accused to exculpate himself. *See* Advisory Committee Note to Rule 804(b)(3).

In order to adduce the corroboration or lack thereof, for the statement one must look to the record. Both attorneys for the defendant/appellant represented to the court that they had interviewed the witness Dalton and would testify that Dalton had made the same statement orally to them; the statement

itself contains an averment that the statements are true and finally but of the utmost importance, it is signed under the penalties of perjury. Certainly the witness Dalton's exposing himself to criminal liability for perjury, is in and of itself corroborative of the trustworthiness of the statement. In *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976) the court stated:

> There is a strong indication of reliability in Tindall's testimony. His statements were made under oath and any misrepresentation or deliberate falsehood might subject Tindall to the sanctions of perjury. Tindall was relating facts surrounding a cocaine transaction in which he participated and of which he possessed firsthand knowledge; therefore, there was no reliance upon potentially erroneous secondary information and the possibility of faulty recollection was minimized. . . .

In *United States v. Tony*, 599 F.2d 787 (5th Cir. 1979) a bank robbery prosecution, the court held it was reversible error not to have admitted a statement of a witness claiming privilege against self-incrimination and consequently unavailable. The statement which corroborated defendant's defense that he had won incriminating bait money while gambling with declarant was against declarant's penal interest because it involved him in illicit gambling and disclosed that he had been gambling with large sums of money shortly after the robbery. But even if less clear that a statement should have been admitted as against penal interest, it should have been admitted pursuant to Rule 804(b)(5) as evidence of a material fact (identity of the robber) and because it was more probative on the point than any other evidence that could be procured and the "interest of the justice" demanded that jury consider statement since it corroborated defendant's testimony and undercut credibility of two prosecution witnesses who claimed that defendant had lost, rather than won, money gambling.

Clearly, in the instant case the court in ruling the statement inadmissible, foreclosed the defendant/appellant from presenting to the jury the most relevant and probative evidence available as to his innocence. The case was a *one* witness case, in effect, for the government. The evidence relied upon was the testimony of Agent Joseph Keefe of the D.E.A., who had worked in an undercover capacity. Agent Keefe's memory certainly was not infallible and the Dalton statement was completely inconsistent with the events, as depicted by the agent, relating to the defendant/appellant. The jury in acquitting the co-defendant Vecchio, certainly indicated that if the statement had been available to them, it would have been considered.

This is a case where from the above argument it is apparent that there is a direct divergence of opinion between the United States Courts of Appeals for the District of Columbia and the First Circuit.

Conclusion

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

A1

United States Court of Appeals For the First Circuit

No. 81-1784

UNITED STATES OF AMERICA,
APPELLEE
v.
ANTHONY ZIRPOLO,
DEFENDANT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before

CAMPBELL, *Chief Judge,*
BOWNES, *Circuit Judge,*
and CAFFREY,* *District Judge.*

Paul P. Caradonna, for appellant.
Vincent L. Gambale, Attorney, Department of Justice, with whom *William F. Weld,* United States Attorney, and *Martin D. Boudreau,* Special Attorney, Department of Justice, were on brief, for appellee.

April 5, 1983

* Of the District of Massachusetts, sitting by designation.

CAMPBELL, *Chief Judge.* Anthony Zirpolo was convicted of one count of conspiracy to possess and distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846, and three counts of possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. On appeal he raises two issues: (1) whether the district court erred by ruling that a former co-defendant who had pled guilty but had not been sentenced could invoke the fifth amendment privilege against self-incrimination, and (2) whether the district court erred by ruling that an affidavit signed by the same co-defendant exculpating Zirpolo was inadmissible because it lacked corroboration. We affirm.

The facts can be summarized briefly. Zirpolo was indicted along with two co-defendants, Joseph Vecchio and Edward Dalton. Prior to trial, Dalton entered into a plea bargain with the government whereby he pled guilty to three of the five counts against him. The government promised to dismiss the two remaining counts when he was sentenced. Dalton had yet to be sentenced when Zirpolo was tried.

At Zirpolo's trial, agent Keefe of the Drug Enforcement Agency, testified that he purchased an ounce of cocaine from Dalton in the spring of 1980. According to Keefe, Dalton referred to his boss as "Zip" and arranged a meeting between Keefe and Zirpolo after Keefe complained about the quality of the cocaine he had purchased. Keefe testified that he met with Zirpolo and Dalton on June 25, 1980 and discussed the quality of the cocaine that Zirpolo could supply in the future. In September 1980 Keefe spoke to Zirpolo over the telephone and arranged to purchase more cocaine. On September 11, 1980 Keefe arrived at the Impact Chemical Company in East Boston, Zirpolo's place of business, and saw Zirpolo who pointed to a metal box saying "it's over there." Keefe paid

Zirpolo $3,600 and took the box which was later found to contain cocaine.

After the government had rested, Zirpolo informed the judge that he had subpoenaed Dalton to testify. After a recess, Dalton and his attorney appeared in the courtroom, and Dalton's attorney stated that his client, invoking his fifth amendment privilege, declined to testify. Zirpolo then sought to introduce an affidavit signed by Dalton stating that Zirpolo had nothing to do with the drug sales to agent Keefe; that drugs were not discussed when Dalton, Zirpolo and Keefe met on June 25; and that as far as Dalton knew, Zirpolo had no knowledge of the contents of the package Keefe picked up at the Impact Chemical Company in September.[1] Both the government and Dalton's attorney objected to the introduction of the affidavit. After hearing argument on both Dalton's right to plead the fifth amendment and the admissibility of the affidavit, the district court ruled that Dalton could invoke the fifth amendment privilege because there was a possibility that his testimony might reveal evidence of

[1] The affidavit states:

I, EDWARD DALTON, hereby state as follows:

(1) I am a defendant in *United States v. Dalton* and have pleaded guilty to 3 counts of a 5-count indictment which charges me with conspiracy and distribution of cocaine.

(2) My co-defendant in this case is Anthony Zirpolo.

(3) John O'Master, who I met while visiting Mr. Zirpolo at MCI Norfolk, introduced me to Agent Joseph Keefe who I later sold cocaine to.

(4) Mr. Zirpolo had nothing to do with the cocaine sales to Keefe of May 20, 1980, June 19, 1980 and June 20, 1980.

(5) My daughter and I picked up Mr. Zirpolo at Avis near the airport on June 25, 1980 and were met at the airport Hilton by Mr. Keefe. During the discussions we had, we did not talk about drugs as my daughter was present.

(6) On September 11, 1980 or maybe the day before, I delivered a package to Mr. Zirpolo's place of business to be picked up by Mr. Keefe. As far as I know, Mr. Zirpolo did not know what was in that package.

I have read what is stated above and it is true to the best of my belief.

Signed under the penalties of perjury. September 21, 1981.

other crimes and because two of the counts against him were still pending. The court further ruled that the affidavit was inadmissible because it lacked corroboration. Zirpolo appeals from both rulings.

I.

Zirpolo's contention that Dalton could not invoke the fifth amendment privilege against self-incrimination is incorrect. A witness who has pleaded guilty may still invoke the privilege as long as there is a possibility that his testimony might incriminate him of other crimes.[2] *United States* v. *Johnson,* 488 F.2d 1206, 1209 (1st Cir. 1972). *Accord United States* v. *Yurasovich,* 580 F.2d 1212 (3d Cir. 1978); *United States* v. *Roberts,* 503 F.2d 598 (9th Cir. 1974), *cert. denied,* 419 U.S. 1113 (1975). In deciding that a witness's testimony might incriminate him, a district judge "may appraise a claim of privilege in light of his 'personal perception of the peculiarities of the case' that the witness is mistaken and that the answers 'cannot possibly' incriminate." *United States* v. *Johnson,* 488 F.2d at 1209, *quoting Hoffman* v. *United States,* 341 U.S. 479 (1951). *See also United States* v. *Lowell,* 649 F.2d 950, 961 (3d Cir. 1981).

The record reveals ample basis for the district court's determination that Dalton's testimony might tend to incriminate him. Although the government had agreed to recommend dismissal of the two counts to which Dalton had not pled guilty, these counts had not yet been dismissed as of the time of Zirpolo's trial. The possibility remained, therefore, that the court would not approve of the plea

[2] The possible effect of testimony by an unsentenced witness on his subsequent sentencing is a further matter which courts have weighed in permitting invocation of the privilege. *See Jones* v. *Cardwell,* 686 F.2d 754 (9th Cir. 1982); *United States* v. *Trejo-Zambrano,* 582 F.2d 460 (9th Cir.), *cert. denied,* 439 U.S. 1005 (1978). As Dalton's testimony was potentially incriminating for other reasons, however, we need not address the impact it might have had on his sentencing.

bargain, *see United States* v. *Escobar,* 653 F.2d 34 (1st Cir. 1981); Fed. R. Crim. P. 11(e)(2), and that Dalton would have to stand trial on those counts. *See also United States* v. *Valencia,* 656 F.2d 412 (9th Cir.), *cert. denied,* 454 U.S. 877, 903 (1981).

There was also a real possibility that Dalton's testimony would incriminate him of crimes other than the ones with which he had been charged. For one thing, Dalton signed an affidavit, under the penalty of perjury, that referred to some of the specific events at issue in Zirpolo's trial. *See* note 1, *supra.* Dalton's attorney represented to the court that he feared his client would open himself up to a perjury charge if he testified about the events described in the affidavit. Given the substantial evidence presented at the trial which contradicted the statements in the affidavit, it was hardly unreasonable for the district court to believe it possible that Dalton's in-court testimony would tend to incriminate him of perjury.

There was also a distinct possibility that Dalton's testimony, particularly upon cross-examination, would have furnished a link to evidence of his involvement in other drug-related crimes. All parties agree that Keefe's conversations with Dalton included discussions of other drugs. Zirpolo, however, argues that such discussions could have been excluded from Dalton's testimony.[3] This is unrealistic. Even if it may sometimes be feasible for a district court to reconcile the defendant's right to present witnesses with a witness's privilege against self-incrimination by limiting the scope of the latter's testimony, *see United States* v. *Pardo,* 636 F.2d 535 (D.C. Cir. 1980); *United States* v. *Moore,* 682 F.2d 853

[3] Zirpolo also claims that the government agreed to exclude testimony concerning other drugs. Our review of the record only shows that the government agreed not to introduce in its direct case testimony that agent Keefe discussed other drugs with Dalton. Such an agreement, of course, would not bar the government from impeaching Zirpolo's witnesses by referring to their dealings with other drugs.

(9th Cir. 1982), "[c]ourts have often recognized the need to prevent coconspirators from 'whitewashing' each other through use of testimony unchallengeable for one reason or another." *United States* v. *Lowell,* 649 F.2d at 962. Because the conversations relating to other drugs here were contemporaneous with the very events at issue in Zirpolo's trial, and would have shed light upon Dalton's dealings with Keefe, it clearly was important to allow the government to cross-examine Dalton about these conversations had he testified. Given this fact we do not think that the district court erred in ruling that Dalton could refuse to testify altogether.

Zirpolo relies upon *United States* v. *Pardo,* 636 F.2d 535, but even assuming we were to agree with *Pardo* in all respects — a determination we need not now make — that case is distinguishable. In *Pardo* the co-defendant who sought to invoke the fifth amendment privilege had already been convicted and sentenced. There was thus no possibility, as there was here, that the co-defendant would still have to stand trial on the charges for which he had been indicted. Moreover, in *Pardo* there was no indication that the witness's testimony would lead to any evidence of other crimes. The District of Columbia Circuit was of the impression that the witness could easily testify as to the relevant transactions without implicating any other criminal conduct he might have engaged in. There was no suggestion, as there is here, that the witness's testimony about the events in question at the trial would likely involve discussion of other crimes. *See United States* v. *Lowell,* 649 F.2d at 963 (*Pardo* is inapplicable where the government's impeachment would likely uncover evidence of other crimes related to the same pattern of activity at issue in the trial).

II.

Given Dalton's unavailability to testify, Zirpolo argues that his affidavit should have been admitted as a statement against interest under Rule 804(b)(3) of the Federal Rules of

Evidence. The rule permits the introduction of hearsay statements where the declarant is unavailable and the statement

> was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Although we do not decide the issue, we shall assume for purposes of discussion that the affidavit was a statement against Dalton's penal interest. Still, the district court did not err in refusing to admit it given the absence of circumstances clearly corroborating its trustworthiness.

We discussed Rule 804(b)(3)'s corroboration requirement in *United States* v. *Barrett,* 539 F.2d 244 (1st Cir. 1976). We stated

> [T]here is no question that Congress meant to preclude reception of exculpatory hearsay statements against penal interest unless accompanied by circumstances solidly indicating trustworthiness. This requirement goes beyond minimal corroboration. Trial judges will have to make an assessment case by case.... In cases that are open to reasonable differences, this court is unlikely to substitute its judgment for that of the district court.

Id. at 253.

In the present case there is not only little evidence tending to corroborate the trustworthiness of Dalton's affidavit, the circumstances suggest that it might well be untrustworthy.[4]

[4] At trial Zirpolo argued that one witness had corroborated the affidavit by testifying that Dalton had told him that he had

The affidavit was presented to Dalton, after he had pled guilty, by the constable who was serving Zirpolo's subpoena. Dalton's attorney was not notified and was not present when Dalton executed it under penalties of perjury. When later Dalton appeared with his attorney at Zirpolo's trial, the attorney vigorously opposed its use, saying that "Mr. Dalton was not aware that he didn't have to sign this or accept this, and it seems to me that the statement therefore amounts to a hoax." Dalton's attorney expressed fear that the affidavit could open Dalton to a perjury charge.

We think that whatever weight might normally attach to the fact the document was signed under penalty of perjury was severely diminished by the circumstances under which it was executed. Having pled guilty to acts touched upon in the affidavit, the uncounselled Dalton might have felt he was immune from further prosecution and could say whatever would most assist a friend. *See United States* v. *Trejo-Zambrono,* 582 F.2d 460. As we stated in *United States* v. *Annese,* 631 F.2d 1041 (1st Cir. 1980), "The bare testimony of a co-defendant charged with the same crimes as the one calling him as a witness is utterly devoid of corroboration. Indeed the whole scenario argues against trustworthiness." *Id.* at 1045.

Affirmed.

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delivered a package to Impact Chemical Company. This testimony, however, goes only to the fact that a package was delivered, not to the essential statement in the affidavit that as far as Dalton was aware Zirpolo did not know that the package contained cocaine. *See* note 1, *supra.*

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